There are two reasons which may account for the hesitancy of the courts in adopting less stringent rules where there is consummation: first, that consummation is the execution and hence a necessary step towards the completion of the marital state; and secondly, that the legitimacy of possible issue is endangered.[28] As to the former, it is now uniformly held that consummation is not necessary to the validity of a marriage.[29] The latter is apparently based upon the theory that an annulment is equivalent to a finding that there never was a valid marriage, thus rendering issue illegitimate. This construction has been stated but so far as is known, there is no decision so holding. Moreover the question is now largely academic in the light of statutes making such issue legitimate.[30] In view of this, the restriction on annulment where there has been intercourse seems baseless.

In the recent case of *Brown* v. *Scott* (Md. 1922) 117 Atl. 114, the court limited the application of the distinction between consummated and unconsummated marriages by granting annulment of a consummated marriage to an immature plaintiff for a fraudulent misrepresentation of character. The plaintiff's immaturity is logically of importance only as regards the quantum of proof required to show fraud. Such persons are easily duped. Judicial recognition of this fact has given it the effect of a rule of substantive law. In its origin, however, it is rather an evidentiary assumption than otherwise. But from the reasoning of the other cases it would seem that after consummation fraud "affecting the marital status" would have to be of the same character (even though not of a degree so likely to deceive) in the case of immature persons as of others. It is to be hoped that this case will serve as a precedent for the gradual abolition of the unscientific distinction between marriages before and after cohabitation, and lead to the application to the former of the less stringent definition of material fraud now used with reference to the latter.

INTENT TO INJURE AS AFFECTING AN OTHERWISE LAWFUL ACT.—If one party has intentionally inflicted temporal damages on another for which there is no justification, is it a tort, although the former's act was otherwise lawful? Eminent legal writers have answered this question in the affirmative.[1]

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[28] For a judicial discussion of this view as a cause for the rule and a criticism of its unsoundness see *Gatto* v. *Gatto* (1919) 79 N. H. 177, 106 Atl. 493.

[29] *Williams* v. *Williams* (1911) 71 Misc. 590, 130 N. Y. Supp. 875; *Wier* v. *Still, supra,* footnote 20; *Martin* v. *Otis* (1919) 233 Mass. 491, 124 N. E. 294; see *Barnett et al.* v. *Kimmell* (1859) 35 Pa. St. 13, 19.

[30] For a citation of the statutes see 1 Stimson, *American Statute Law* (1886) 670; see also N. Y. Dom. Rel. Law, *supra,* § 7.

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[1] Holmes, *Privilege, Malice and Intent* (1894) 8 Harvard Law Rev. 1; Ames, *How Far an Act May Be a Tort Because of the Wrongful Motive of the Actor* (1905) 18 Harvard Law Rev. 411; Wigmore, *The Tripartite Division of Torts* (1894) 8 Harvard Law Rev. 200; Wigmore, *Justice Holmes and the Law of Torts* (1916) 29 Harvard Law Rev. 601, 607 *et seq.;* Jeremiah Smith, *Tort and Absolute Liability* (1917) 30 Harvard Law Rev. 241; Jeremiah Smith, *Crucial Issues in Labor Litigation* (1907) 20 Harvard Law Rev. 253; Pollock, *The Law of Torts* (11th ed. 1920) 2 *et seq.; contra,* Bigelow, *Theory and Doctrine of Tort* (1906) 18 Green Bag. 132, 133-5; 2 Cooley, *Law of Torts* (3rd ed. 1906) c. xxii. For other discussions of this question see Ormsby, *Malice in the Law of Torts* (1892) 8 Law Quart. Rev. 140; Cooke, *A Proposed New Definition of a Tort* (1898) 12 Harvard Law Rev. 335; Dowling, *Wanton Interference with Contract and Business Relations* (1902) 54 Central Law Journ. 426; Terry, *Malicious Torts* (1904) 20 Law Quart, Rev. 10; Basak, *Principles of Liability for Interference with Trade, Profession or Calling* (1912) 28 Law Quart. Rev. 52; Eliot, *Malice in Tort* (1919) 4 St. Louis Law Rev. 50; Laurence, *Motive as an Element in Tort* (1919) 12 Maine

Other things being equal, it has generally been held that the pursuit of one's own "legitimate interest" is sufficient justification.[2] What is a "legitimate interest" is, in the final analysis, a question of policy.[3]

The only type of case which could be taken as squarely answering this question in the negative is one where there is no policy at all in favor of the defendant's act; in other words, no justification. Such a factual situation is difficult to imagine.[4] However, there have been several cases which have ostensibly held that intent cannot make an otherwise rightful act a tort. Upon analysis it appears, however, that these have been either cases between competitors,[5] where the act of the defendant was justifiable, as in pursuit of a "legitimate interest of his own," or cases where the act was justified by the policy in favor of freedom of contract,[6] or that in favor of allowing a man to do as he wishes on his own land.[7]

The weight of authority answers the question in the affirmative. Where the defendant enters into competition with the plaintiff with the intent of injuring him, and not in pursuit of an interest of his own which the court deems legitimate, it is a tort. Thus, for a banker, having a personal dislike for a barber, to open a barber shop in competition with the latter for the sole purpose of gratifying that dislike was held to be a tort.[8] So, where the defendant resented the fact that the plaintiff had secured the exclusive agency for the sale of certain sewing machines, and advertised the machines for sale at a lower price, although he did not have any, he was liable as a tortfeasor.[9] In these cases the policy in favor of competition was not considered sufficient justification, because the interests which the defendants sought to further by competition were not considered legitimate. If, however, the defendant's motive had been solely to secure pecuniary gain in the business entered, there would have been sufficient justification.[10] However, it was also held to be a tort for the defendant wholesaler to go into the retail business in competition with the plaintiff in order to punish him for buying from its competitors.[11] The defendant's object was legitimate—to make money in the wholesale business, and its means were legitimate—competition in the retail business. Though the de-

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Law Rev. 47. For comparison of the Common and Civil Law on this point, see Jenks, *Theories of Tort in Modern Law* (1903) 19 Law Quart. Rev. 19; Walton, *Motive as an Element in Torts* (1909) 22 Harvard Law Rev. 501.

[2] *Mogul S. S. Co.* v. *McGregor etc.* [1892] A. C. 25; *Welinsky* v. *Hillman* (1920) 185 N. Y. Supp. 257; *Collins* v. *American News Co.* (1901) 34 Misc. 260, 69 N. Y. Supp. 638, *aff'd* (1902) 68 App. Div. 639, 74 N. Y. Supp. 1123; *Thomas* v. *Cincinnati etc. Ry.* (C. C. 1894) 62 Fed. 803; *Scott-Stafford Opera H. Co.* v. *Minneapolis Musicians Ass'n* (1912) 118 Minn. 410, 136 N. W. 1092; *Transportation Co.* v. *Standard Oil Co.* (1902) 50 West Va. 611, 40 S. E. 591; *Delz* v. *Winfree* (1894) 6 Tex. Civ. App. 11, 25 S. W. 50; see note (1904) 62 L. R. A. 673.

[3] See Holmes, *Privilege, Malice and Intent.* (1894) 8 Harvard Law Rev. 1. The discussion of justification and the "legitimacy" of interest is beyond the scope of this note.

[4] *Ibid.*, p. 5.

[5] *Bohn Mfg. Co.* v. *Hollis* (1893) 54 Minn. 223, 55 N. W. 1119; *South Royalton Bk.* v. *Suffolk Bk.* (1854) 27 Vt. 505; *Passaic Print Works* v. *Ely & Walker etc. Co.* (C. C. A. 1900) 105 Fed. 163.

[6] *Orr* v. *Home Mutual Ins. Co.* (1857) 12 La. Ann. 255; *I. & G. N. Ry.* v. *Greenwood* (1893) 2 Tex. Civ. App. 76, 21 S. W. 559; *Heywood* v. *Tillson* (1883) 75 Me. 225; but see *infra*, footnote 12.

[7] *Mahan* v. *Brown* (N. Y. 1835) 13 Wend. 261; *Falloon* v. *Schilling* (1883) 29 Kan. 292.

[8] *Tuttle* v. *Buck* (1909) 107 Minn. 145, 119 N. W. 946; see (1909) 9 COLUMBIA LAW REV. 455.

[9] *Boggs* v. *Duncan-Schell Furniture Co.* (1913) 163 Iowa 106, 143 N. W. 482.

[10] Holmes, *op. cit.*, p. 3; *Anonymous* (1410) Y. B. 11 Hen. IV, pl. 21, f. 47, 1 Ames & Smith, *Cases on Torts* (3rd ed. 1910) 758.

[11] *Dunshee* v. *Standard Oil Co.* (1911) 152 Iowa 618, 132 N. W. 371.

fendant's ultimate object was the furtherance of its interests as a competitor in the wholesale business, in its relation to the plaintiff it was engaged in a bargaining struggle, in which different policies come into play. The case illustrates the inadequacy of any general rules as to justification and that each case must be considered on its own facts.

Similarly it is tortious for an employer to discharge his employees because they trade with the plaintiff,[12] unless there is sufficient justification,[13] and the policy in favor of freedom of contract will not suffice.[14] Nor may the discharge of an employee be unjustifiably procured.[15] Finally, it has been held to be a tort to erect a fence on one's own land for the sole purpose of shutting out the light from another's window.[16] Many cases apparently in accord with this theory of torts may perhaps be distinguished as involving conspiracy.[17]

In the case of *American Bank & Trust Co.* v. *Federal Bank*,[18] the Supreme Court unanimously held that the plaintiff bank was entitled to an injunction restraining the Federal Reserve Bank from attempting to force it into the Federal Reserve system[19] by accumulating checks drawn on the plaintiff, and then presenting them in such large amounts as to necessitate the maintenance of excessive cash reserves. This case is almost identical with *South Royalton Bank* v. *Suffolk Bank*,[20] which held that such action was no tort. The court in the latter case took the position that the case was but "the ordinary one of a creditor calling upon his debtor for his pay, at a time and at a place and in a manner to which the debtor has no right to make objection" and that "motive alone is not enough to render the defendants liable for doing those acts which they had a right to do." On the other hand, in the Federal Reserve Case, the court said, *per* Mr. Justice Holmes, that the right of the defendant to collect the checks was not absolute, but qualified, and not to be exercised for the purpose of injuring the plaintiff. The United States Supreme Court thus definitely answered the question in the affirmative. The Vermont case, on its face, seems directly *contra*, but is distinguishable on the ground that the paries were competitors.[21]

In the recent case of *Beardsley v. Kilmer* (App. Div. 3rd Dep't 1922) 193 N. Y. Supp. 285, New York took a different view of the question. The defendant was a manufacturer of patent medicines. The plaintiff had been the editor and part owner of a newspaper and as such had derisively commented upon the defendant and his products. The defendant started a rival paper with the avowed purpose of ruining the plaintiff's publication. In this he was successful, the plaintiff being forced out of business. The Appellate Division held that it was not error for the trial judge to dismiss the complaint after the foregoing facts had been shown.

This case is thus apparently contrary to the weight and tendency of the au-

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[12] *Hutton* v. *Watters* (1915) 132 Tenn. 527, 179 S. W. 134; *Graham* v. *St. Charles Street R. R.* (1895) 47 La. Ann. 214, 16 So. 806; 47 La. Ann. 1656, 18 So. 707.

[13] *Robison* v. *Texas Pine Land Ass'n* (Tex. Civ. App. 1897) 40 S. W. 843.

[14] But see *supra*, footnote 6.

[15] *London Guaranty Co.* v. *Horn* (1903) 206 Ill. 493, 69 N. E. 526; *cf. Vanarsdale* v. *Laverty* (1871) 69 Pa. 103.

[16] *Burke* v. *Smith* (1888) 69 Mich. 380; *contra, Mahan* v. *Brown, supra*, footnote 7; *cf. Falloon* v. *Schilling, supra*, footnote 7.

[17] *Sultan* v. *Star Co.* (1919) 106 Misc. 43, 174 N. Y. Supp. 52; *Hawarden* v. *Youghiogheny & Lehigh Coal Co.* (1901) 111 Wisc. 545, 87 N. W. 472; *Ertz* v. *Produce Exchange* (1900) 79 Minn. 140, 81 N. W. 737; *Webb* v. *Drake* (1890) 52 La. Ann. 290.

[18] (1921) 256 U. S. 350, 41 Sup. Ct. 499.

[19] The court did not think that there was any policy in favor of this object.

[20] *Supra*, footnote 5.

[21] Cases cited *supra*, footnote 5.

thorities. However, the situation was not one where the defendant was motivated solely by malice,[22] as was the case in *Tuttle* v. *Buck*,[23] The defendant's motive, at least in part, was to protect his drug business and his act may therefore have been justified, as done in pursuit of a "legitimate interest of his own."[24]

It thus seems fairly well settled that the intentional infliction of temporal damage for which there is no justification, is a tort, although the act was otherwise lawful. This question still remains, however; under all the circumstances of the case, will the court consider the ultimate motive, as opposed to the immediate object of the defendant a justification? The failure to distinguish clearly between the two questions involved has led to much confusion of language in the decisions.

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[22] See *Aikens* v. *Wisconsin* (1904) 195 U. S. 194, 203, 25 Sup. Ct. 3, where Holmes, *J.*, interpreted "maliciously injuring to import doing a harm malevolently for the sake of the harm as an end in itself, and not merely as a means to some further end legitimately desired." *Cf.* Cropsey, *J.*, in *Saperstein* v. *Berman* (1922) 195 N. Y. Supp. 1, 3: "People should not live merely to annoy their neighbors, and those who do things solely for that purpose should be enjoined."

[23] *Supra,* footnote 8.

[24] See *supra,* footnotes 2, 3.